

# **ADVANCED DUI SEMINAR**

December 12, 2016

Phoenix, Arizona



## **PRESCRIPTION DRUGS/ MARIJUANA DUI'S**

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Distributed by:

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# DUI Prescription Drug Cases

APAAC Advanced DUI Seminar  
December 12, 2016

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## Prescription Drug Cases are more and more prevalent

- Better detection, police training
- Newer and more potent drugs
- Doctor Shopping
- Doctors are more willing to prescribe
- People are aware of dangers and enforcement of alcohol DUI's, but ignore prescription warnings

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## Older Drivers and Medications

2009 AAA Study - 78% of 55 and older drivers surveyed take more than one Rx med. & only 28% knew impact the drugs could have on their ability to drive.



Remember during jury selection

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## Some Disturbing Facts

- ▶ Opioid prescriptions tripled over 20 years
- ▶ Prescription painkillers are more widely used than tobacco in America
- ▶ Americans consume about 80 percent of the global opioid supply and 99 percent of the supply of hydrocodone
- ▶ In 2014:
  - Number of US deaths from Homicide-16,000
  - Number of US deaths from prescription painkillers-19,000

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## The Presentation of a DUI Prescription Drug Case Should Be Harder than Other DUI Cases

...Then why does it seem harder?

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## ATTITUDE!!!



- ▶ Jurors
- ▶ Judges
- ▶ Officers
- ▶ & Prosecutors

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► Issues with Judge/Jury Appeal

- “Legal”
- A doctor prescribed & is monitoring
- They/someone they know take them
- Less common knowledge
- Its not the drug – it’s the medical condition
- Impairment looks different
- Technical




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The Media Thinks it’s Harder

- USA Today: “DUIs involving prescription drugs difficult to prove” 10/17/2010
- New York Times: “Drivers on Prescription Drugs Are Hard to Convict”

Where might they be getting that idea from???

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ISSUES WITH PROSECUTORS

*We tell ourselves it’s harder. If we don’t change our attitude about prosecuting a prescription DUI, how can we expect to change anyone else’s?*

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## Alcohol Is a Drug!

- It has been well communicated that impaired driving by alcohol is dangerous and illegal.
- But because of its popularity, prevalence and acceptance, alcohol is not seen as a drug.
- The reason we have DUI laws is to keep drivers impaired by any substance off the road!




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## Why are we more comfortable prosecuting an Alcohol DUI?

- Effects of alcohol are common knowledge
- Common behaviors associated with drinking too much
- Recognizable odor associated with alcoholic beverages




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## Why are we more comfortable prosecuting Illegal Drug DUI?

- Stigma around illegal drug use
- We are taught illegal drugs are bad
- Media has contributed to terror of drugs




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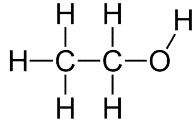
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## Ethanol vs. Prescription

- ▶ Ethanol (drinking alcohol) is a neurotoxic psychoactive drug.
- ▶ As a psychoactive drug, it is a chemical that binds to receptors in the brain causing changes in brain function and resulting in alterations in perception, mood, or consciousness.
- ▶ Ethanol is a CNS Depressant.




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## Ethanol vs. Prescription

- ▶ Most CNS depressants including ethanol act on the brain by increasing activity at receptors for the inhibitory neurotransmitter gamma-aminobutyric acid (GABA). They increase GABA signaling—thereby increasing inhibition of brain activity—to produce a drowsy or calming effect.




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## Ethanol vs. Prescription

- ▶ Other CNS Depressants:
  - **Benzodiazepines**, such as diazepam (Valium) and alprazolam (Xanax);
  - **Non-benzodiazepine sleep medications**, such as zolpidem (Ambien), eszopiclone (Lunesta), and zalepon (Sonata);
  - And **Barbiturates**, such as mephobarbital (Mebaral), phenobarbital (Luminal Sodium), and pentobarbital sodium (Nembutal)

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## How Do We Overcome These Perceptions?

### EDUCATE THE JURY

- Voir dire
- Opening Statement
- Jury instructions
- Testimony
- Closing Argument



Why science teachers should not be given playground duty.

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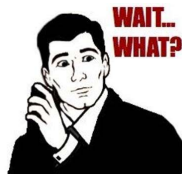
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### EDUCATE THE JURY

- Not your typical DUI
- Challenge the Jury–Make them think:  
“Can you even get a DUI on prescription drugs?”  
“Wait, my doctor TOLD me to take these prescriptions, can I still get a DUI?”




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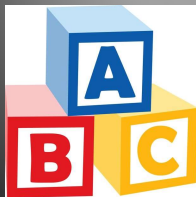
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OK, Let's Start with...,  
The Basics




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## Impairment DUI Statute 28-1381(A)(1)

**It is unlawful for a person to**

- drive/APC, a vehicle, within this state
- while under the influence of intoxicating liquor, **any drug**, a vapor releasing substance, or **any combination** thereof
- if impaired to the slightest degree.

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## “Ability to Drive” reminder:

- ▶ A jury instruction requiring proof that a defendant's ability to drive was impaired is invalid.
- ▶ The State does not need to offer any evidence of bad driving, only that the defendant was impaired.
  - State v. Miller, 226 Ariz. 190

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## Per se DUI Drugs 28-1381(A)(3)

- ▶ Drive or be in actual physical control
- ▶ of a vehicle
- ▶ in this state
- ▶ while there is any drug defined in 13-3401 or its **metabolite** in the person's body.
  - Catch All 13-3401(28)

Why important in a prescription case? Defendant has the burden!

**Don't Forget-Establish is in 13-340**

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## Make Differences of Charges Clear to Jury

- ▶ (A)(1)
  - Prescription not a defense
  - Impairment to the slightest degree
- ▶ (A)(3)
  - No Impairment
  - Simple Yes or No issue
    - Is drug in system or not?

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## What Do We do With a DUI Drug Case?

- ▶ Prove impairment – (A)(1) and/or...
- ▶ Prove illicit drug in system with no prescription – (A)(3)




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## What Not to Do

- ▶ Do not be too technical
- ▶ Don't rush – educate




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## METABOLITE

### *State v. Harris (Shilgevorkyan, RPI)*

- ▶ (A)(3) only applies to metabolites that are *capable of causing impairment*.
- ▶ Mere presence of inactive metabolites such as carboxy-THC does not violate 28-1381(A)(3)
- ▶ Applies to Prescription Drugs as well

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## Prescription Drug Defense 28-1381(D)

- ▶ Potential defense to (A)(3) charge
- ▶ Not a defense to (A)(1)
  - ARS 28-1381(B)
- ▶ Must be valid on DOV
- ▶ Must be U.S. doctor

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## Prescription Drug Defense 28-1381(D)

- ▶ Per 28-1381D, Medical Practitioner is:
  - Podiatrist (DPM)
  - Dentist (DDS)
  - Medical Doctor (MD)
  - Osteopath (DO)

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## Prescriptions

### ► 28-1381(D) is an affirmative defense.

- Must be alleged 20 days before trial
- Defendant's burden to raise/disclose
  - preponderance
  - file discovery request
- Not an element
- Question of fact




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## Case on Point

### ► *Fannin* –

- 28-1381(D) is an affirmative defense
- Defendant's burden




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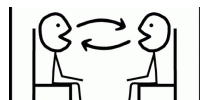
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## Prescriptions

### ► 28-1381(D) is an affirmative defense.

- File Discovery Request
  - Prescription is hearsay
  - Who will testify for Defense?
  - Ask for a witness interview!




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## Prescriptions

- ▶ 28-1381(D) is an **affirmative defense**.

**Why ask for a witness interview?**

- See if witness will appear
- See if defendant using drugs “as prescribed”
- Doctor shopping? Alcohol use?
- Drive or operate heavy equipment?

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## Doctor Shopping

Remember taking 2 or more drugs at same time can be against doctor's orders.

Not uncommon for people to use multiple prescription drugs, as prescribed, from multiple doctors.

**Example: Oxycodone and Xanax**

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Aaand..., it's a suppository

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## DUI is Strict Liability

- ▶ Ignorance of drug effects **NOT** a defense
- ▶ Intent to drive **NOT** required (APC)
- ▶ Move *in limine* to preclude/object

*State v. Parker*, 136 Ariz. 474; (App. 1983); *State v. Zaragoza*, CR-08-0286-PR (Ariz. 2009); *Whisler v. State*, 121 Nev. 401, 116 P.3d 59 (Nev. 2005).

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## Prescription Drug DUIs

- Look for Indications Abusing the Prescription
  - Kills prescription defense
  - Assists with jury/judge appeal




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## Prescription Drug DUIs

- Look for Indications Abusing the Prescription
  - Defendant's statements
    - Times took
    - How much?
  - Multiple prescriptions/Doctors.
  - Labels
  - Count pills – number left
  - Warnings
  - Pills in defendant's possession – time of day
  - Hide/deny?

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## How Crime Lab Can Help Prove Abusing the Drug

- Criminalist **can** tell you...
  - General effects of that drug
  - Effects of drug combinations
  - Effects on human performance
  - Documented therapeutic levels & estimated half life
- Criminalist **cannot** tell you...
  - If the person was impaired
  - Exactly when the person used the drug
  - How much the person consumed

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## Prescriptions

### ▶ 28-1381(D)

- Must take prescription as prescribed
- Before amendment—using a drug prescribed by a doctor




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## DRE Exam

### ▶ Three determinations of a DRE

- Is the person impaired? If the DRE concludes that the person is impaired...
- Is the impairment due to an injury, illness or other medical complication, or is it drug-related? If the impairment is due to *drugs*...
- Which category or combination of categories of drugs is the most likely source of the impairment?

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### DRE Exam–Standardized and Systematic

- ▶ The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs. The process is *systematic* because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment.
- ▶ The DRE evaluation is *standardized* because it is conducted the same way, by every drug recognition expert, for every suspect whenever possible.

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### Seven Drug Categories

- ▶ CNS Depressants (ETOH, Valium, Soma)
- ▶ CNS Stimulants (Meth, Cocaine, Desoxyn)
- ▶ Hallucinogens (MDMA, LSD, Peyote)
- ▶ Dissociative Anesthetics (PCP, Ketamine, DXM)
- ▶ Narcotic Analgesics (Heroin, Vicodin)
- ▶ Inhalants (Gases, Solvents)
- ▶ Cannabis (Marijuana, Hash)




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### Medical Marijuana – defense

Dobson v. McClennan (City of Mesa Prosecutor's Office RPI) No. CV-14-0313-PR

- ▶ AMMA does not immunize from prosecution under 28-1381A3
- ▶ Affords cardholder affirmative defense if they show marijuana or its metabolite in insufficient quantity to cause impairment

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## Lab Report

- ▶ Therapeutic doses
- ▶ Metabolites and impairment
- ▶ Contact the toxicologist **BEFORE** trial
- ▶ Do they need to check for additional drugs?

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## Why Take Prescriptions? Even if “as prescribed”

To alleviate pain  
To change attitude  
To effect mood

Person is under its influence  
Emphasize impairment

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## Utilize *Voir Dire* Questions & Jury Instructions

- ▶ Prescription Drugs
- ▶ Illegal Drugs
- ▶ Metabolites
- ▶ Impairment on (A)(3)
- ▶ Medical Marijuana
- ▶ Others??

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### Tox Results–What Do The Numbers Mean?

- ▶ For vast majority of drugs, no direct correlation of blood drug concentrations with degree of impairment currently exists.
- ▶ There is no “legal limit” in Arizona so must look at signs of impairment – bring this out

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### Direct Examination of a Toxicologist

- ▶ Establish chain of custody
- ▶ Use expert to strengthen other parts of case (stop, roadside FSTs, etc.)
- ▶ Tie the drugs found to the impairment observed at all stages of the case
- ▶ Anticipate defenses/defense expert

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### Prescriptions

- ▶ Get a copy
  - Prescribed dosage vs. amount taken
  - Investigate validity
- ▶ Evidence defendant is abusing the drug (“as prescribed”)
- ▶ Consult with toxicologists

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## Prescriptions

- ▶ PDR/WebMD (your best friend)
  - Warnings
  - Side-effects
- ▶ Emphasize impairment and tox results
  - Tie together
- ▶ Additive effects (if more than one or ETOH combo)

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## DUI Drugs 28-1381(A)(3)

- ▶ *State v. Harris (Shilgevorkyan, RPI)*
  - Must prove metabolites are capable of impairment.
- ▶ *Dobson – medical marijuana*
  - DEF. must prove not enough to impair




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## Voluntary Act (Ambien Defense) ARS § 13-201

- ▶ Because DUI is strict liability – may not apply
- ▶ **WORST** case – the voluntary act is taking the drug, not knowingly driving, etc.

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### Voluntary Act

- ▶ Even if were required – person
- ▶ Again at MOST goes to taking the drug
  - Got up, took keys, exited house, got into car, started car, backed up, drove in the street, made turns etc., etc., etc.,

Looks a lot like a voluntary act and even intent ! Defendant does not have to remember it . . .

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### AMBIEN – Sleep Driving Defense

- ▶ What is the “therapeutic level” for Ambien and ALL similar medications?

Asleep . . .



Sleep driving is NOT a defense in Arizona!  
(motion in limine)

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### Observations

- ▶ FSTs
- ▶ Coordination
- ▶ Paranoia
- ▶ Paraphernalia & pill bottles
- ▶ Physical signs & symptoms (sweating, fidgety, itchy, etc.)
- ▶ Odor

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## Mental Impairment

- ▶ As important as physical impairment
- ▶ In drug cases – juries often give this great attention
- ▶ Bad back, knees, age, coordination, shoes, etc. will not cause mental impairment

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## Anticipate Defenses

- ▶ Therapeutic Dose
- ▶ Injuries or illnesses – medical treatment
- ▶ Prescriptions
- ▶ Inconsistencies between officer's observations
- ▶ Inconsistency between what was called and tox results
- ▶ Review defense disclosure
- ▶ Non-DRE issues (APC, ID, etc.)
- ▶ Minimal Impairment
- ▶ Is it timely disclosed?

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## Therapeutic Dose

**Therapeutic Dose Does NOT mean the defendant is Not Impaired**

Def: Giving the dose that may be required to produce a desired effect.

- ▶ Less than therapeutic dose = NONE
- ▶ More than therapeutic dose = **TOXIC**

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## Therapeutic Dose

Therapeutic Dose Does NOT Mean  
the Defendant is taking the drug  
"as prescribed"

It tells you nothing about

- ▶ When the person took the drug
- ▶ How much was taken
- ▶ Etc.

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## Direct Examination of a Toxicologist

- ▶ Preparation, Preparation, Preparation
- ▶ Study the expert's field
- ▶ STUDY THE DRUG(S)
- ▶ Be aware of communication issues
- ▶ Edit out jargon
- ▶ In-court demonstrations




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## Direct Examination of a Toxicologist

- ▶ Ensure expert has reviewed all the case evidence
- ▶ In general do not stipulate to expert's credentials
- ▶ Qualify as an expert
- ▶ Establish reliability of the evidence/method

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- ▶ Establish chain of custody
- ▶ Use expert to strengthen other parts of case (stop, roadside FSTs, etc.)
- ▶ Tie the drugs found to the impairment observed at all stages of the case
- ▶ Anticipate defenses/defense expert




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Try to correlate driving and observations to the drug found




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## Direct Examination of a Toxicologist

- ▶ Ask good questions
  - Do you have an opinion as to whether the defendant was impaired by drugs? CAREFUL
    - More likely to get symptoms, etc.
  - Do you have an opinion as to what kind of drug caused the impairment?
  - What is that opinion?
  - Why did you come to that opinion?

TALK TO YOUR TOXICOLOGIST BEFORE TRIAL to see what they are comfortable testifying to.

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## Lab Report

- ▶ Who analyzed – which part (screening/confirmation, who will you call?)
- ▶ Understand what it means!!
  - PDR – warnings, side effects, recommended dosages
- ▶ Ensure both screening and confirmatory test has been completed and disclosed
- ▶ Chain of custody

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## Lab Report

What if the analyst is no longer available???

- ▶ Panic?
- ▶ No!




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## Tox Results without Toxicologist that tested

- ▶ An expert witness may testify in the form of an independent opinion when another expert who personally analyzed blood sample not available when relying on facts and data generated by the non-testifying expert. *State v. Karp* (Voris, RPI) No. 1 CA-CV 13-0599, (App. 2014)
- ▶ *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014)
- ▶ *Williams v. Illinois*, 132 Sup. Ct. 1222 (2012)

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## DRE Defense Expert Potential Areas of Cross

- ▶ Lack of state certification/permit
- ▶ # of times evaluated impaired person in field
- ▶ Prior testimony/writings that contradict the current opinion
- ▶ Challenge research/experience relied on

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## DRE Defense Expert Potential Areas of Cross

- ▶ State Labs methods are valid
- ▶ Get them to concede can have impairment at therapeutic dose
  - Argue – why give it to them/take if not going to affect
- ▶ Polydrug – additive affects
  - Not aware of any studies of the interaction of these drugs
  - FDA and drug companies do not do those kinds of studies

~~Concessions~~ – drug impairs

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## Drugs – Areas For Cross

- ▶ Has witness seen defendant impaired/on drugs before?
- ▶ Is witness familiar with drugs in question?
- ▶ Witness's ability to know defendant was not abusing prescription, did not effect etc.
- ▶ Witness's knowledge of drugs in defendant's system

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## MUST Work Up These Cases

### ▶ Jury de-selection – voir dire

- Attitudes & familiarity with specific drug & drug category
- Who has chronic pain?
- Metabolites
- No tox results
- Case specific questions

### ◦ Two charges

- Prescription is not a defense to (A)(1)
- (A)(3) no impairment – will they follow law?
- Prescription only defense to (A)(3) if taking as prescribed
- Must take as prescribed

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## MUST Work Up These Cases

### ▶ Motions *in limine*

- Defendant's burden to prove valid prescription & as prescribed
- Preclude medical marijuana & or prescription evidence/testimony if (A)(1) only
- Facts used just for sympathy
- Passive inhalation
- All irrelevant evidence – review case & raise appropriate arguments
- Prescription is hearsay
- Consult with your criminalist

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### Prescription Drug Highlight: Benzodiazepines

- ▶ Class of drugs includes Xanax (alprazolam), Klonopin (clonazepam), Valium (diazepam), and Ativan (lorazepam).
- ▶ Class of strong CNS depressants used to treat anxiety, insomnia, seizures, and alcohol withdrawal.
- ▶ Even at therapeutic levels, impairment is possible. This happens especially when someone first begins taking the drug or changes their dose.
- ▶ After THC and its metabolite Carboxy-THC, alprazolam was the most commonly confirmed drug in blood samples at the DPS Crime Lab. It beat out meth, cocaine, and heroin.

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## Prescription Drug DUIs

- Pin Down Why Taking – why acting as are
- Rule out medical explanations
  - mental vs. physical impairment
  - symptoms not consistent with medical condition
  - mental/medical issues will not cause HGN, etc.

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## How Crime Lab Can Help – Defense Ploys

- ▶ Contamination
- ▶ Equipment/maintenance issues
- ▶ The science (lab's method) is EXCELLENT they can and will defend it
- ▶ Consult with them symptoms of impairment
- ▶ If they report it – the drug IS THERE

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## Prescription Drug DUIs

- Pin Down Why Taking – why acting as are
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## Why Take Prescriptions?

Even if "as prescribed"

To alleviate pain  
To change attitude  
To effect mood

Person is under its influence  
Emphasize impairment

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## Defense Angles

- ▶ Therapeutic dose
- ▶ Injury
- ▶ Medical condition
- ▶ Mental conditions
- ▶ Sleep driving
- ▶ Doctor's know better than you
- ▶ Tolerance
- ▶ Jury nullification
- ▶ Prescription

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"These pills will help you stay asleep.  
They change your dreams into  
Powerpoint presentations!"

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